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THEORETICAL AND FOREIGN ELEMENTS
IN THE FORMATION
OF THE
AMERICAN CONSTITUTION.

INAUGURAL-DISSERTATION
ZUR ERLANGUNG DER
PHILOSOPHISCHEN DOCTORWÜRDE
DER
ALBERT-LUDWIGS-UNIVERSITÄT
ZU
FREIBURG IM BREISGAU.

EINGEREICHT VON
A. C. COOLIDGE

AUS
BOSTON.

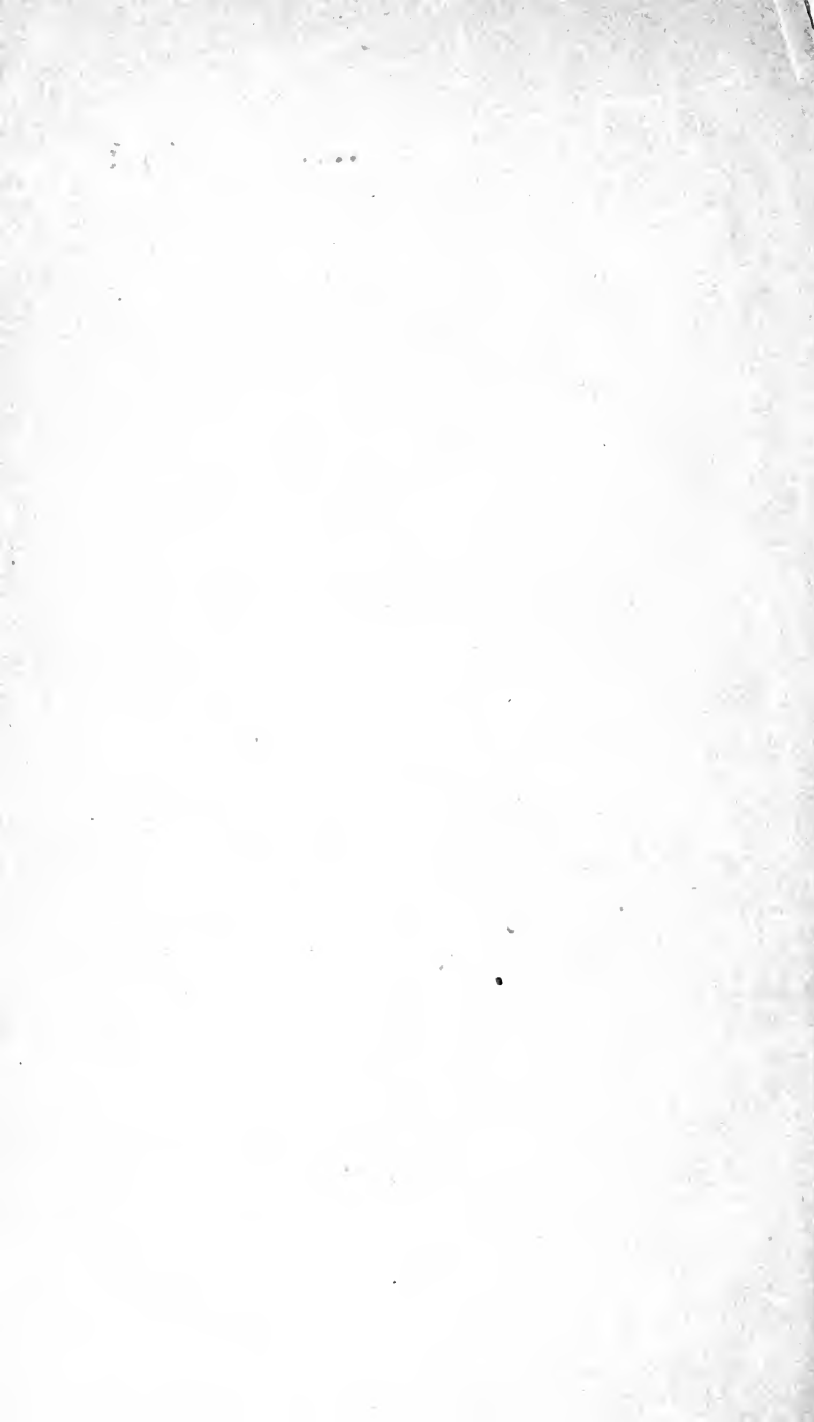
FREIBURG I. B.
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The Constitution of the United States of America is now a little more than a century old. At its birth it was looked upon, even by many of its fathers, as a new and hazardous experiment. Today, it has stood the test of time with marked success; it has outlived many younger sisters, and it seems likely to remain substantially unchanged for an indefinite period. It has been more than once imitated wholly or in parts: and though it has by no means proved always suitable for transplanting, this is not to be wondered at. It was formed by a number of highly intelligent men, as a result of mutual concession, not to be a model system applicable in all places at all times, but to suit the wants and ideas of the thirteen Confederate American States, to bind them together into a nation and to assure to them a great future. All this it has done.

Roughly speaking, there are three theories about the Constitution.

1st. It is unprecedented. Enthusiastic and not too critical patriots have declared that it has no model and have naturally compared it to Minerva springing

many of the single ¹⁾ features were new is another question. Professor HART has summed them up well in the paragraph in which he says: "In the history of Federation the United States stands, therefore, as a pioneer; for it was different in basis and in spirit from any Union which had preceded it, and it has been the exemplar for all subsequent confederations. (It was the first federation in history to provide itself with an independent and adequate revenue; it was the first to frame a judiciary having a jurisdiction equivalent to the federal powers; it was the first to commit all external and interstate commerce to the union; it was the first entirely to forbid treaties of the states with foreign powers or with each other; it was the first to enter upon a policy of dispossessing itself of exclusive federal territory; it was the first to leave to the States unrestricted power over matters of police; it was the first to find peaceful means of securing the obedience of States" ²⁾). Be this as it may, it is not my intention to go into the subject, nor shall I enter into the question of what parts of the federal Constitution are copied from those of the

¹⁾ For foreign impressions of the newness of the Am. Gov. as a Bundesstaat compare BLUNTSCHLI'S. — "Die Gründung der Amerikanischen Union" p. 24 HEINRICH VON GAGERN in his Schreiben an den Oestreichischen Ausschuss (quoted in REIMANN'S Die Ver. St. im Uebergange vom Staatenbund zum Bundesstaat p. 231) MEYER'S, Deutsches Staatsrecht p. 29. SCHULZE, Deutsches Staatsrecht I p. 46; Tocqueville etc.

²⁾ "Introduction to the study of federal Government in Harvard Historical Monographs No. 2. p. 50.

States, ¹⁾ but shall merely attempt to point out certain features taken directly from English or other foreign models, or at least suggested by them. ✓

But there is another and much broader field of inquiry which no one, to my knowledge, has yet really entered into, and which is too vast for me to be able to give more than a slight idea of it here. What were the general ideas of Government entertained by the founders of the Constitution, what induced them to prefer one institution to another. It is all very well to say that they were "led astray by no theories of what might be good, but claved closely to what experience had demonstrated to be good". ²⁾ and we know that they were for the most part practical men little given to abstract reasoning. Still, experience, immensely important as it was, was by no means their only teacher. The debates of the convention were not mere discussions as to whether the relations of the Executive to the legislative were more satisfactorily adjusted in Massachusetts or in South Carolina, whether the Lycian or the Achean league had the better mode of representation. On the con-

¹⁾ La Constitution fédérale diffère essentiellement de la Constitution des Etats Unis par le but qu'elle se propose, mais elle s'en rapproche beaucoup quant aux moyens d'atteindre ce but. L'objet du Gouvernement est différent, mais les formes du Gouvernement sont les mêmes. TOCQUEVILLE I. p. 264. For studies of this question see Professor ALEXANDER JOHNSON'S Article in the New Princeton Review Sept. 1887, and J. H. ROBINSON in Annals of the American Academy of Political and Social Science Oct. 1890.

²⁾ Mr. J. R. SOWELL, address before the N. Y. Reform Club April 13. 1888.

trary, there was a great deal of searching after and discussion of general principles, and the popular doctrines of the day were repeatedly expressed.¹⁾ But before trying to describe some of these, I wish to dwell, for an instant, on those clauses that were not affected by them; and on certain special characteristics of the Philadelphia Convention.

When important interests clash, no arguments of abstract justice or historical examples suffice to reconcile them. Sherman and Bedford were as little moved by the Lycian league and Montesquieu's approval of its nature, as were the Pinckneys and Butler by hearing Mason inveigh against slavery and discourse on servile insurrection in Greece and Sicily. The three compromises of the constitution were of the utmost importance, compromises with no principle except that of give and take.²⁾ Of two of them this has always been recognized so that nothing more need be said

¹⁾ In BLUNTSCHLI, *Lehre vom modernen Staat* III, 367 We find "Die Verfassungen der Amerikanischen Gesamt-Republik und der Länderrepubliken sind aus einer Mischung entstanden von Alt-Englischen und Amerikanischen Rechtsbegriffen, Institutionen und Sitten, von naturrechtlichen Doctrinen und von freier Wahl des Zweckmässigen". This is a good summary of the influences that formed the constitutions but leaves all difficulties intact as to the share of each.

²⁾ Le temps fait toujours naître à la longue chez le même peuple, des intérêts différents, et consacre des droits divers. Lorsqu'il s'agit ensuite d'établir une constitution générale, chacun de ces intérêts et de ces droits forme comme autant d'obstacles naturels qui s'opposent à ce qu'aucun principe politique ne suive toutes ses conséquences. C'est donc seulement à la naissance des sociétés qu'on peut être complètement logique dans les lois. Tocqueville I. p. 206.

about them here, but the third has given such a permanent feature to the constitution, and has had such an influence, even outside of America, that its origin is often more or less overlooked. ¹⁾

The idea of having the upper house of the legislature represent the states and the lower the people, was not a result of a priori reason or suggestion by any example. When the convention met, WILSON and MADISON were as little prepared on one side to accept such an arrangement as was LUTHER MARTIN on the other. The fight was long and bitter, and the representatives of the larger States yielded most unwillingly. ²⁾ The result arrived at may have been excellent in itself and based on sound principles of Government, but it was not through them that it was reached. ³⁾ Nor should it be forgotten that the exclusive right of the lower house to originate money bills, though following

¹⁾ The Federalist is clear enough on the point LXI. (Ham.) p. 430. 4

²⁾ It is rather curious that four (YATES, GERRY, MARTIN, MASON) of the Committee who brought about the compromise afterwards opposed the whole constitution.

³⁾ It is worth noting that, with all their ability, the arguments of the Federalist must be regarded with some caution. The papers in spite of their judicial tone were merely written to win votes. HAMILTON declared in the last day of the convention, in which he had not played one of the most important parts, that no man's ideas were more remote from the plan than his own were known to be; and he and Madison felt no responsibility for each other's sentiments in the different papers. (SEE MADISON'S letter to JEFFERSON. Aug. 10. 1788.) We must observe some of the same caution about the ratifying conventions.

obvious examples, was still an essential part of this compromise, in fact, the only return the larger states got for their concession. It matters not that MADISON, WILSON and other members of the disappointed party insisted that this was no concession at all and that they did not care to have it; the clause was proposed as a concession and voted as such.

It has often been pointed out that the framers of the American Constitution were conservative. This was a matter, not only of choice but of necessity. They were, for the most part, attached to their state Government; but even if they had not been, they were far too wise not to put any startling innovations into a document that had to be ratified by thirteen different assemblies. To be sure, the political ideas of the American masses were, many of them, exceedingly crude; the most absurd notions were put forward and were often received with applause. But though a bill of rights, with a few high sounding phrases and "glittering generalities", would have facilitated the ratification of the new plan, the Yankee farmer and the Pennsylvania Dutchman were too cautious and shrewd at the bottom to give up institutions with which they were familiar and to which they were attached, in favor of some untried scheme come from a source of which they were only too jealous. The knowledge of this weighed continually on the Convention, as can be seen from numberless references, and it strengthened the hands of the opponents of any innovation. No wonder that the discontented members made full use of

such an advantage ¹⁾ and yet the final result was dangerously near the limit of the popular desire for reform.

Here we see one of the great differences between the position of the Philadelphia Convention and that of the *Assemblée Constituante* of two years later. ²⁾ Americans have often delighted in comparing the two, in contrasting the inborn good sense and wise conservatism of the Anglo-Saxon with the visionary ideas of the Frenchman. Without denying that there is much truth in this, though the reasons, for the fact are more historical than ethnographical, we must not lose sight of the totally different circumstances under which the two bodies met, the abuses to be reformed, and the limits to their power.

Another noteworthy circumstance of less importance at Philadelphia was the secrecy of all proceedings. This had the happiest effect. Cheap eloquence was kept within bounds; in fact those most addicted to it. (MARTIN, MERCER, GERRY) were among the least satisfied in the end; demagogic ideas were seldom put forward; the members could speak their minds freely, discuss temperately, and, most valuable of all, change their opinions without fear of consequences. When we note besides, the small number

¹⁾ The men who oppose a strong and energetic Government are, in my opinion, narrow minded politicians, or are under the influence of local views. The apprehension expressed by them that the people will not accede to the form proposed is the ostensible, not the real cause of opposition. But admitting the present sentiment to be as they prognosticate" etc.

Washington to HAMILTON. July 10, 1787.

²⁾ And of many other constitutional conventions.

of delegates, we can well understand the unusual advantages of the situation.

The character of the members was also exceptional. Their average of intelligence was very high; they were the élite of the country, and as such not always completely in touch with the mass of their fellow citizens. Five of the most prominent ¹⁾ more than hinted at their admiration for the British Government above all others, though they fully recognized that it was out of the question to attempt to imitate it. Others had little faith in the future of the institutions they were about to establish. ²⁾ A great proportion were lawyers; more than half had had the benefit of a college education, ³⁾ and almost without an exception, they had had practical experience in the difficulties of Government. From such an assembly something better was to be expected than mere pandering to popular prejudices or attempts to put into practice visionary schemes; and they did not disappoint this expectation. Their lack of touch with the masses was strikingly shown by the fact that there is no sign that the great majority ever grasped the importance, in the eyes of the people, of bills of rights.

From the very beginning of the American Revolution we can trace the existence of two currents of thought, even where we can not always keep them

¹⁾ HAMILTON, RANDOLPH, DICKENSON, GERRY, C. PINCKNEY. Comp. Bancroft's History of the Constitutions II p. 45.

²⁾ For instance GORHAM (Elliot V. 392) and WILLIAMSON V. 359.

³⁾ Comp. Bancroft's History of the Constitution II. p. 9.

apart. The colonies rose against the mother-country to defend their rights, but what were those rights? natural or historical, as men or as Englishmen? The individual pamphleteer could dwell on either as he chose; but when the first Congress assembled they were brought face to face with the question as to what was the justification for their existence. ¹⁾ As long as any hope of accommodation was left, the narrower basis was the safer, as well as more in accordance with the ideas of the majority of the delegates, though the Declaration of Rights unanimously adopted, kept on both grounds. ²⁾ In the Revolution the colonists were revolted British subjects and their rights as British subjects played by far the larger part in the movement so that the discussion on both sides of the water was chiefly a legal one. "The debates in both Houses of Parliament, from the accession of GEORGE III. to the recognition of American independence, are astonishingly unlike those of the present day in one particular. They turn, to a surprising extent on law, and specially on constitutional law ³⁾. In America "The student of our Revolution is constantly impressed with its legal character. The most prominent parts were played by the jurists. The revolted colonists did not talk of their rights as men, ⁴⁾ but of their rights as British subjects.

¹⁾ See ADAM'S WORKS II p. 366, 370—377.

²⁾ See CURTIS'S Constitutional History of the U. S. I p. 10, 13 814.

³⁾ MAINE'S Popular Government, p. 220.

⁴⁾ This, as we have seen above is not wholly true. See also STORY'S attack on JEFFERSON I ch XVI about the rights the colonist brought over from England.

Their complaint was of acts of usurpation, of the violation of their chartered liberties, of the Royal encroachment upon legally established privileges. In this respect they resembled the Whig leaders of the 17th. Century. It has been said that the liberty which the Anglo-Saxon race now every where enjoys is derived from the British Constitution as settled by the Revolution of 1688. All subsequent revolutions in Europe are not more plainly the offspring of the French Revolution than was ours of the Revolution of 1688. It was founded, like that, upon a breach of the fundamental law by the rulers. The language of the State conventions at the time of the separation from England, shows that the people universally regarded the liberties for which they were contending as an inheritance from their forefathers.¹⁾ On the other hand, the Declaration of Independence is based on natural rights and, to a certain extent, the prevalence of bills of rights in the State Constitutions, and the importance attached to them, can be quoted proofs of the force of the other current.

When the separation from the mother country was completed, although the Americans had nothing more to do in theory with the privileges of British subjects, their own were descended from them; and in spite of the increase of the tendency to speculative

¹⁾ W. T. BRANTLY in the Southern Law Review. Vol. VI No. 3 p. 351. For an instance of the tone see the resolution of the Maryland Convention Jan. 18th. 1776. "The people of this province, entitled to the privileges of Englishmen and inheriting the spirit of their ancestors etc."

doctrines in the next twenty years, the habit of seeking on all occasions for precedents, continued to prevail and does, in the United States, at the present day. It is of great importance that the nature of the Revolution enabled the Americans, while detesting Great Britain to admire the British constitution. Under it they had first claimed their liberties, and they had no reason for regarding it as a French Republican did the ancien régime. Had it been so both the Federal and the State constitutions would not be what they are.

But even the rights of Englishmen and every view of Government, however historical, must have a groundwork of theory. Who were the theoretical writers that had most influence in America? and what was the nature of that influence? This is no easy question to answer with accuracy, as the fact that a man expresses an idea similar to one of some great author does not prove that he has copied from the author or even read him. When RUTLEDGE, KING and BUTLER announced that property was the principle aim of Society they may have been consciously borrowing from LOCKE¹⁾ a theory that suited their circumstances so well; when WILSON replied to them that "the cultivation and improvement of the human mind was the most noble object" it is possible that he was deliberately falling back on

¹⁾ "Whereas Government has no other end but the preservation of property". — Of Civil Government Chap. V. Sec. 94. See Elliot V. p. 279, 280, 281, 309.

Aristotle ¹⁾ for Wilson was a well read man, but both these theories can be found in other writers. Still, we know who were most read at the day and we can draw some general conclusions.

In England, in the latter part of the 18th Century, before the French Revolution, two schools of political thought are easily distinguishable. The prevailing one drew its philosophy from Locke and to a lesser extent from such older writers as MILTON, HARRINGTON and SIDNEY: its more positive ideas of Government from MONTESQUIEU and the constitutionalists of whom the chief were BLACKSTONE and DELOLME. The other school was that of ROUSSEAU, and its chief English exponents were PRIESTLEY and PRICE. Both schools were represented in America. By the free union of the States "the social contract of theory seemed to be translating itself into history" ²⁾. And yet the immediate causes of the struggle were in the old fashioned English creed, rather than in any new developement of doctrine. If men like FRANKLIN and JEFFERSON sympathised with the French philosophy, WASHINGTON seemed to be an American reproduction of HAMPDEN, and HAMILTON and the Federalists were believers in MONTESQUIEU and ardent admirers of the British constitution. Thus two distinct forces were blended in the general result" ³⁾. Let us examine these forces

¹⁾ Aristotle. — Politics III. 4. (6).

²⁾ This is going a little too far "The social compact of theory" was between individuals, not societies.

³⁾ LESLIE STEPHEN — English Thought in the 18th century II fr 376.

beginning with LOCKE, and here I can not do better than again to quote Mr. LESLIE STEPHEN.

"LOCKE expounded the principles of the Revolution of 1688, and his writings became the political Bible of the following century. They may be taken as the formal apology of Whigism. He gave the source from which later writers drew their arguments, and the authority to which they appealed in fault of argument. That authority vanished when the French Revolution brought deeper questions for solution and new methods became necessary in politics as in all other speculation. But during the 18th Century, LOCKE's theories gave his countrymen such philosophical varnish as was necessary for the embellishment of political pamphlets and parliamentary rhetoric: Their success was partly due to the fact that, like the revolution which they justified, they are a compromise between inconsistent theories. The characteristic quality of LOCKE's mind is shown in the tenacity with which he adheres to certain principles which seem to work in practice, though they fit rather awkwardly in any logical Framework¹. LOCKE's influence in America was hardly less than in England though it has not always been so clearly recognized, as the greater celebrity which ROUSSEAU gave to some of the same doctrines has obscured their source".

(LOCKE's theories fitted perfectly with the arguments of the Colonies during the dispute with the mother country. They were supported by his autho-

¹) LESLIE STEPHEN II p. 135.

9⁹ rity in the claim that illegal attempts made upon their liberties absolved them from their allegiance and gave them the right to resist. "When the colonies in 1776 formed their Bills of rights, the great authority as to those rights was LOCKE. The Bill of Rights of Massachusetts, Pennsylvania, Maryland and other States set forth in almost the exact language of Locke, that "all Government of right originates from the people, is founded on compact only, and instituted solely for the good of the whole". ¹⁾ In the fourth article of the Pennsylvania Bill (1776) we find "all power being "originally inherent in, and consequently derived from, "the people, therefore all officers of the Government, "whether legislative, or executive, are their trustees "and servants, and at all times accountable to them". The Whig philosopher writes: "The people alone can appoint a form of commonwealth". ²⁾ "The Legislative is a fiduciary power to act for certain ends, and there remains in the people a supreme power to remove or alter the legislature". ³⁾ Lord SOMERS, the author of the famous Declaration of Right, and whose "writing expressed concretely what LOCKE formulated abstractly", ⁴⁾ was also the author of political tracts some of which were reprinted and widely read in America at the time of the Revolution.

It seems more than probable that the Declaration of Independence was inspired by LOCKE's treatise

¹⁾ Brantly — article quoted in previous note p. 353. I have also generally followed him in the rest of this paragraph.

²⁾ Locke Sec. 141.

³⁾ Locke Sec. 149.

⁴⁾ BRANTLY p. 355.

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"Of Civil Government". RICHARD HENRY LEE made the charge and I think a comparison of the two works will suggest the same thing to any observer. JEFFERSON in his later controversy with ADAMS referred to the accusation and to the one that his substance was taken from the Declaration of Rights of 1774, remarking quietly: "whether I had gathered my ideas from reading or reflection, I do not know. I know only that I turned to neither book nor pamphlet while writing it. I did not consider it as any part of my charge to invent new ideas altogether, and to offer no sentiment which had ever been expressed before". ¹⁾ In the original draft of the Declaration it is stated that "all men are created equal and independent" which, before the last word was erased, corresponded exactly to the statement in the second chapter of the treatise "Of Civil Government" that in the state of nature, men are all equal and independent".

The whole political philosophy of Locke rests on the simple idea that men originally in a state of nature formed, a social compact which is the foundation of Government and society, and that from this primitive equality arises, as a natural consequence, the sovereignty of the people. None of these principles were, in the least, original with LOCKE, but he combined them into an attractive system "which stamped by his authority became the orthodox Whig doctrine" ²⁾ and remained so until ROUSSEAU pushing their

¹⁾ JEFFERSON'S Works IV 376.

²⁾ LESLIE STEPHEN II p. 136.

logical consequences to lengths before undreamt of which the French revolution attempted to put in practice, new Schools and new theories arose, and the political ideas of Locke became but a matter of history.

The belief in a state of nature is one of the most curious ones that has ever had great vogue in the domain of political speculation. It did not rest on the slightest basis of historical evidence; on the contrary the entire absence of such evidence was the strongest possible argument against it. It was accepted in a highly religious age, although it fits in as badly as possible with the accounts in the Bible. It has been traced back to the Roman lawyers ¹⁾ and seems a necessary premise to an original compact, for what else could have preceded that compact? In the absence of any definite knowledge on the subject, free play was left to speculation about the condition of mankind in this state. HOBBS and SPINOSA declared it to be one of war. „Bellum omnium contra omnes”; LOCKE, PUFFENDORF, MONTESQUIEU, and many others described it as quiet and peaceful; ROUSSEAU and his disciples idealized it as the golden age. According to the first school men originally united for self protection, and this is also the belief of the second ²⁾ who make them in their primitive State timid and

¹⁾ For its origin See MAINE'S Ancient Law.

²⁾ MONTESQUIEU (I Chap. 3) also gives weight to the natural social tendency of mankind: the doctrine of Aristotle Politics 4 I. Ch.

insecure; according to ROUSSEAU, society is merely due to the corruption and more particularly to the greed of the human race.

The lack of examples of the natural state troubled, not a little, many writers on the subject. LOCKE, particularly, exerts himself to find instances ¹⁾ and among other things triumphantly declares that "all princes and rulers of independent governments, all through the world, are in a state of nature." ²⁾ It is obvious how easily the Americans could apply this doctrine to the states.

When the American Revolution broke out, as almost all the previously constituted authorities continued to exist, even if in a slightly irregular fashion, the people as a whole could hardly be called in a state of nature, although this opinion was advanced by PATRICK HENRY. ³⁾ With the states it was otherwise. "In 1787 the states were thought to be in a state of nature towards one another. Each state regarded itself as sovereign and independent; to adopt a national government was to quit the state of nature and put on the bonds of civil society" ⁴⁾. The Federalist declared that they ceded some of their natural rights in order to vest the Government with requisite powers". MADISON remarked in the Con- ~~vention~~ ^{that the federal Union might be considered as analogous to the fundamental compact by which}

¹⁾ LOCKE Chap. VIII.

²⁾ LOCKE Chap. II sec. 14.

³⁾ ADAMS Works II. 366. 368.

⁴⁾ BRANTLY. p. 358.

individuals compose one society ¹⁾ though WILSON and HAMILTON by attacking LUTHER MARTIN's doctrine of a state of nature previous to the confederation ²⁾ showed that the theory was not universally accepted. When ADAMS, in his work on Government wrote that "the United States of America have exhibited perhaps the first examples of Governments erected on the simple principles of nature" ³⁾ he also probably referred to the compact theory.

It is as the foundation of this theory that doctrines of the state of nature have their practical importance. The idea that all government is founded on compact was current in the Western world for many generations ⁴⁾. Its only rival, government by divine ordination, was finally discredited in England by the Revolution of 1688. Hume refused the compact theory completely but with very little effect, as he supplied nothing to take its place. It was the basis as well for the absolutism of HOBBS as for the extreme democracy of ROUSSEAU. Two kinds of contract are visible in it which though often confused,

¹⁾ ELLIOT. V. p. 206.

²⁾ „ V. p. 211.

³⁾ ADAMS IV. p. 75.

⁴⁾ "Während Jahrhunderten war in der Staatswissenschaft die Lehre in fast unbestrittener Herrschaft, dass der Staat, wenn nicht die Gewalt sondern das Recht seiner Entstehung leite, ein Werk des freien Vertrags aller derer sei, welche zuerst zum Staate zusammentreten. Man dachte sich den Staat wie eine Aktiengesellschaft oder wie eine Genossenschaft von einzelnen deren jeder einen Theil seiner Kraft und seiner Freiheit an den Verband aller abgebe, damit er desto sicherer seiner zurückbehaltenen Guter gereige." BLUNTSCHLI: Die Gründung der Amerikanischen Union p. 4.

can be traced in most writers on the subject ¹⁾. The contract of the people to their rulers and that of man to man, the *pactum subjectionis* and the *pactum unionis*. The first is the idea prevailing in most of the older authors on Government including GROTIUS and PUFFENDORF, and is still visible in SIDNEY and LOCKE. The second, the real Social Compact, was first made clear by HOBBS, and then with surprisingly little change used by ROUSSEAU to come to the most opposite conclusions.

The Americans have never been given to much unnecessary refining on theoretical questions unless something was to be gained by it. They generally accepted the idea that all government is founded on compact ²⁾ and if on the one hand the New Hampshire and Massachusetts ratifying conventions in their resolutions called the new Constitution "a solemn compact", ³⁾ the men of 1787 "were as ready to call the Constitution of England a compact as so to denominate the system just formed. It is true that they applied the same term to a league or Confederacy, and it is therefore difficult to determine the exact sense in which the word was understood by them when used in reference to the federal Government. ⁴⁾ This doctrine was held by both Federalists and anti Federalists.

¹⁾ For a learned work on these subjects see GIERKE-JOHANNES ALTHUSIUS und die Entwicklung der naturrechtlichen Staatstheorien.

²⁾ Wilson however denied it. Elliot II, 498.

³⁾ They were quoted by Calhoun in the debate of 1833.

⁴⁾ BRANTLY p. 359.

JOHN JAY declared all States to rest on social compacts; ¹⁾ RICHARD HENRY LEE indignantly asked "Where is the compact between nation and Government"? ²⁾ and LUTHER MARTIN even went so far as to write. "When once the people have exercised their power in establishing and forming themselves into a State Government, it never devolves back to them: nor have they a right to resume it or again to exercise that power until such events take place as will amount to a dissolution of their State Government"; ³⁾ a theory which is exactly the one on which HOBBS, a writer for whom MARTIN could hardly have much sympathy, bases his whole fabric. ⁴⁾

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The vagueness with which the word compact was used, and understood in America in 1787 was of the utmost importance for the future of the country. It prevented the real relation of the States to each other and to both the new and the old general Governments from being made clear from the beginning; on compact rested many of the arguments of the supporters of the old confederation and of the claims of the smaller States; on it turned the whole later questions of the rights of nullification and secession.

If a state of nature is the necessary foundation for an original contract of society, the sovereignty of the people is the only logical result of it, even though

¹⁾ See STORY'S Commentaries. Book III ch. 3.

²⁾ Quoted in BANCROFT. History of the Constitution II p. 447.

³⁾ LUTHER MARTIN'S Letter. Elliot I. p. 387.

⁴⁾ Compare HOBBS LEVIATHAN Part II chap. 18.

countless writers many of them of eminence have tried to escape this conclusion. This is even more inevitably the case when only an agreement of man with man is supposed, as by HOBBS, than when one between ruler and people is premised as by GROTIUS and others. This idea of the sovereignty of the people is the central idea of LOCKE'S doctrine, and it is also, in a still higher degree, the corner stone of the whole American political system ¹⁾. the reasons for this are well known and were largely historical. Everything tended to make the new Republic democratic, the natural tendency of new countries, the character of the early settlers and the absence of class distinctions among them, besides the fact that a King and a nobility were the two foes with whom it had had to struggle. The personal part played by the king in bringing about the Revolution is well known, better indeed now than it was then; but also „The worst enemy our grandfathers supposed they had in England throughout their Revolution was the ministerial majority of that House of Commons made up of placemen sitting for rotten boroughs, the sons of peers, a^sl the country-gentleman, who belonged to a caste as much as their first cousins who sat by

¹⁾ Lorsqu'on veut parler des lois politiques des Etats Unis, c'est toujours par le dogme de la souveraineté du peuple qu'il faut commencer. "Le peuple règne sur le monde politique Américain comme Dieu sur l'Univers. Il est la cause et la fin de toutes choses, tout en sort et tout s'y absorbe". Tocquevill I Ch. 4 Compare also Curtis's Constitutional History I p. 317.

titles in the House of Lords".¹⁾ But a belief in the sovereignty of the people in this democratic country was far from making all the members of the convention perfect democrats any more than LOCKE was before them. On the contrary, many of them believed with ALGERNON SIDNEY that "the best governments of the world have been composed of monarchy, aristocracy and democracy"²⁾ they wished to have something of the monarchical and aristocratical principle without either a monarch or aristocrats. The use of the word democracy was generally vague, a fault it has not got over entirely at the present day. GERRY called it the worst of political evils;³⁾ MADISON in the Federalist drew the distinction between a republic and a democracy that the former was a representative system the latter not, therefore the United States under the constitution came under the first head.⁴⁾ At not far from the same time MARSHALL declared in the Virginia Convention "We idolize democracy" and that he admired the new system because it was a well regulated form of that kind;⁵⁾ and WILSON's ideas were somewhat similar. ADAMS finally, in his book, announced "that a simple and perfect democracy never yet existed among men".⁶⁾

It would be foolish to wish to ascribe the intense

¹⁾ CURTIS I p. 466—7.

²⁾ Quoted by ADAMS IV p. 421.

³⁾ ELLIOT V p. 557.

⁴⁾ Federalist No. X.

⁵⁾ ELLIOT III. p. 222.

⁶⁾ Compare ROUSSEAU "Il n'a jamais existé de véritable démocratie et il n'en existera jamais", Contrat Social Livre III. chap. IV.

feeling for liberty of the generation who lived through the revolution to MILTON, SIDNEY, LOCKE and other writers, though their doctrines may have played a part even here. In any case, their influence was much greater in favor of religious toleration. It cannot be doubted that the prevalence of LOCKE's ideas combined with the diversity of creeds in the colonies in producing the remarkable liberality shown in matters of belief by the Americans, very few of whom were affected by the spirit of Voltaire.

There was one thing, and one thing only to damage LOCKE's prestige in the United States and to prevent men from accepting his ideas. His famous constitution for Carolina, threw a deep discredit on his abilities as a practical statesman, ¹⁾ and we observe no tendency to refer to his concrete recommendations. In fact, before leaving him it is worth noting that his influence was that of his general ideas which pervaded and in many ways ruled the thought of the time; and not that of any definite suggestions often quoted and followed.

Of earlier political writers ²⁾ of the same school

¹⁾ See ADAMS remarks on the subject Vol. IV Book on governments.

²⁾ As showing the ideas of the time, the list of authors ADAMS think worthy of special discussion in his book is interesting.

Philosophers. Writers on Government. Opinion of historians.

SWIFT.

MARCHIAVEL

POLYBIUS.

FRANKLIN.

A. SIDNEY.

DIONYSIUS of Hali-

PRICE.

MONTESQUIEU.

cornassus.

HARRINGTON.

PLATO.

LOCKE.

MILTON.

HUME.

we note that HARRINGTON made property, especially in land, the basis of power, favored two Houses (MILTON wished for but one) a relation of the Executive and a long term for the Senate, and SIDNEY in his ponderous volume dwelt on the advantages of mixed Governments.

(The name of one political writer appears again and again in all discussions of the Constitution and frequently with some such prefix as "great" or "celebrated" attached to it. The reader cannot help being struck with the deference paid to MONTESQUIEU. Any opinion of his is seized upon with avidity, as a powerful argument, and the other side never controverts this opinion, but either tries to prove that it has been misunderstood or that it does not apply to the case in hand. The *Esprit des Lois*, which was published in 1748; was an epoch making work and nowhere did it make more of an impression than in England. PAUL JANET in his "*Histoire de la Politique*" says it was undoubtedly the greatest book of the 18th Century. BURKE goes still farther and entitles its author "the greatest genius which has enlightened this age".¹⁾ The statesmen of the Revolution seem to have shared this opinion "Read the discussions of the Federal convention and you encounter the thoughts and formulas of MONTESQUIEU at every step".²⁾ "The writers of the *Federalist* are much discomposed by his assertion that Republican Government is necessarily

¹⁾ BURKE'S Works X 355.

²⁾ BRANTLY: p. 360.

associated with a small territory, and they are again comforted by his admission, that this difficulty might be overcome by a confederate Republic. ¹⁾

MONTESQUIEU's influence on the formation of the Constitution was certainly great, even if we hesitate to agree to Sir HENRY MAINE's assertion that "It may be confidently laid down that neither the institution of a Supreme Court nor the entire structure of the Constitution of the United States ^{were} ~~were~~ the least likely to occur to any one's mind before the publication of the *Esprit des Lois*. ²⁾ But we must be careful about what we ascribe to this influence. As MADISON said: "The British Constitution was to MONTESQUIEU what Homer has been to the didactic writers on Epic Poetry. As the latter have considered the works of the immortal bard the perfect model from which the principles and rules of the Epic art were to be drawn, and by which all similar works were to be judged, so the great political critic appears to have viewed the constitution of England as the standard, or, to use his own expression, as the mirror, of political liberty; and to have delivered, in the form of elementary truths, the severed characteristics of that particular system". ³⁾ Now, it is evident that if MONTESQUIEU's principles were formed on the British Constitution, features of that constitution, transferred, directly or through the medium of examples in the State Govern-

¹⁾ MAINE'S Popular Government p. 234 See Fed. IX.

²⁾ Popular Government p. 218.

³⁾ Federalist XLVII.

ments, to the American one, cannot be said to be due to his influence only even if harmonizing with his theories. Nor does the fact that his doctrines are quoted as being in conformity to some institution prove that they had anything to do with its creation. We must therefore be very cautious in any inquiry into the subject. On the other hand we can remember that, as his dogmas had been violated in the Government of the discredited Confederation, that very discredit would tend to their honor.

One of the most important principles of the great French writer was the necessity for the separation of the Executive, the Legislative and the judicial powers in any Government. Aristotle was the first to point out the existence of these powers in every State, but no separation of them was made in antiquity ¹⁾ and the Roman law gave imperium and jurisdictio to the same magistrates. MONTESQUIEU contrasting in his mind the helpless confusion of the three powers in France with their separation, which he exaggerated in England, made his famous generalisation. Rightly or wrongly it was implicitly accepted in England and America, ²⁾ and it weighed heavily in the scale in the

¹⁾ MAINE Pop. Govt. p. 219 states that it first occurs in the Defensor Pacis of Marsilio da Padova (1327) and Aristotle is certainly not clear on the subject.

²⁾ There are numberless proofs of this. Many years later JEFFERSON wrote in his autobiography p. 82. "It is not by the consolidation, or concentration of power, but by their distribution, that good government is affected". This does not agree with the ideas of ROUSSEAU.

debates as to the formation of the three branches.¹⁾ It is obviously impossible to define the extent of such an influence, to say for instance how much the relations of the President to Congress were a copy of those of King and Parliament; or of those of a Governor and a legislature or a result of Book XI, Chap. 6 of the *Esprit des Lois*. Probably different members of the Convention were affected differently; but, as speaking for the influence of MONTESQUIEU we must notice that the discussion was much more about what was theoretically the best way rather than a disquisition on how well the qualified veto had worked in Massachusetts and New-York, even if the very words of the constitution of the former State were copied into the final draft. This is not the only case where we can say that, though a previous model was copied, MONTESQUIEU'S doctrines were probably the chief reason for its imitation; and it is perhaps true that "In no other Government have these three powers been so clearly separated and been provided with so many means of defence against encroachment as in ours"²⁾ If we add, as we should, to this sentence "except those of the States" we are again brought to face the difficulties of the question.

¹⁾ The Anti-Federalists declared that the separation was not properly preserved. For specimens of the answers to this Fed. (Mad. XLVI and ELLIOT IV. p. 121. SHERMAN alone spoke in favor of supremacy of the legislative ELL. V. 140.

²⁾ For a very different way in which the French have followed the principle comp. the chap. on Droit Administratif. Dicey. Law of the Constitution; Ch. on Droit Administratif.

The fact that the President was armed with a veto for the very reasons for which MONTESQUIEU advised such a step should be taken into account as proving that (this power was not meant to be legislative,) even though, in the abstract, such may have been its historical origin,¹⁾ and M. ADAMS intended it as such in recommending it for the Constitution of Massachusetts.²⁾ It is merely a necessary defence of the Executive. "Si la puissance exécutive n'a pas le droit d'arrêter les entreprises du corps législatif, celui-ci sera despotique ; car comme il pourra se donner tout le pouvoir qu'il peut imaginer, il anéantira toutes les autres puissances".³⁾

Executive and legislative powers have always made their importance felt ; it is only since the doctrine of separation has been recognized that the judiciary has begun to stand beside them, and in America we have the first instance of its taking an equal position. The unique character of the supreme Court of the United States has been recognized by foreign observers. Here again, we see MONTESQUIEU'S influence even though MAINE goes too far in describing one sentence of his as the principle source of the provisions of the American constitution respecting the

¹⁾ "The veto power which to day seems purely a power to prevent the passage of a prospect law, originated as a part of the power to make them" E. C. MASON The Veto Power. HARVARD. Hist. Mon. I.

²⁾ "A balance in the legislature by three equal independent branches" Works IV. 74.

³⁾ Esprit des Lois. Livre XI Ch. 6.

"federal judicature". We must not overlook indeed the fact that instead of separating the judiciary from the other two powers, several members of the Convention were, on the contrary, anxious to associate them in the formation of the laws, ¹⁾ quoting with approval the Law Lords in England, and perhaps thinking, also, of the rights of the French Parlements. The argument used to satisfy them, was that the power of the Supreme Court to pronounce on the Constitutionality of laws would have much the same effect in the end.

M. de LABOULAYE'S interesting preface to his edition of MONTESQUIEU ²⁾ makes the following remarks ³⁾. "Ce qu'on sait moins c'est l'influence de MONTESQUIEU sur la Constitution des Etats Unis. Qu'on lise le troisième Chapitre du neuvième livre de l'Esprit des Lois, on y trouvera, le premier germe de l'Union. C'est la République de Lycie que MONTESQUIEU propose comme modèle d'une belle République fédérative; et cela par la raison qu'on y observe la proportion des suffrages pour régler le vote, les magistratures, et les impôts. En d'autre termes, ce ne sont point de petits Etats, inégaux en richesse et en population qui obtiennent une représentation égale, comme cela avait lieu dans les Pays Bas; l'autorité du peuple domine la souveraineté factice des provinces, l'union l'emporte sur les Etats.

¹⁾ For instance MADISON and G. MORRIS, ELLIOT V 165, 346.

²⁾ Edition GARNIER 1876.

³⁾ Page 16 Introduction.

C'est le problème que les Américains avaient à résoudre en 1787. Consultèrent ils MONTESQUIEU? Oui, sans doute, On a conservé des notes de Washington sur les différentes Constitutions fédératives; on a été surpris de voir que le Général, qui n'était pas un grand érudit, avait remarqué la constitution de Lycie. Il est évident qu'il avait emprunté sa science à l'Esprit des Lois".

Had the example of the Lycian league, as brought forward by MONTESQUIEU, any other role than that of illustration and argument in the system of proportionate representation as adopted in America? This seems to me an open question, but we must go further back than 1787 to answer it. The first proposal for a representation of States, or rather Colonies as they were then in proportion to their importance is to be found in FRANKLIN'S plan of confederation in 1754. Was it suggested by the Esprit des Lois? Had FRANKLIN read the book at that time, only six years after its publication and four after that of its translation into English by THOMAS NUGENT? I have not been able to find out anything about this, but it does not seem at all improbable.

So much for MONTESQUIEU'S direct influence. Indirectly we also owe him much though it is even more impossible to indicate it with precision. The men who made the Constitution were impregnated with his ideas to an extent that must have greatly affected their whole tone of political thought. Some of his theories may even have been the origin of certain

curious fallacies current in the United States today, such as, that Republics are by nature peaceful ¹⁾ or that "we are a plain people". Others have passed away but "Perhaps the chief glory of MONTESQUIEU in the eyes of the present generation is that of having been a pioneer in the application of the historical method to political inquiries. The Convention was fortunate in having such a master. He taught them to consult history rather than theory. He confirmed them in their disposition to follow national precedence, and inspired a cautious and deliberate spirit. We owe it in part to him that our constitution was not constructed upon abstract principles and that it was not made to resemble one of those which the ABBE SIEYES, a few years later, was wont to carry in his pocket". ²⁾

In another way MONTESQUIEU affected indirectly, but profoundly, thinkers in America. Their knowledge and understanding of the British Constitution were due, primarily, to him, for not only did he first explain it to the world, but he inspired the whole later school

¹⁾ This is flatly denied in the Federalist VI and by E. RANDOLPH, ELLIOT, III. 198.

²⁾ BRANTLY p. 363. Compare with this MAINE'S statement (Ancient law p. 86.) "The Book of MONTESQUIEU, with all its defects, still proceeded on that Historical Method before which the Law of Nature has never maintained its footing for an instant. Its influence on thought ought to have been as great as its general popularity, but, in fact, it was never allowed time to put it forth, for the counter hypothesis which it seemed destined to destroy, passed suddenly from the forum to the sheet and became the keynote of controversies far more exciting than are ever agitated in the courts or the schools". The whole of this last sentence is true for France but not for the United States.

of "Constitutionalists" who were extensively read. Here again I cannot do better than to quote from Mr. DE LABOULAYE'S Introduction :

“Le fameux chapitre de la Constitution de l'Angleterre nous apprend peu de chose aujourd'hui ; on a tout écrit sur ce sujet épuisé, mais en 1748 c'était une nouveauté, La Constitution Anglaise n'est pas rédigé en articles comme nos Constitution modernes ; elle repose sur un ensemble de lois, d'usage de précédence qui remontent d'âge en âge jusqu'à la grande charte. Se reconnaître dans ce dédale était au dernier siècle le privilège des jurisconsultes parlementaires. ¹⁾ LOCKE, dans son traité du Gouvernement Civile avait commencé à séculariser la Science, mais MONTESQUIEU est le premier qui, par un exposé systématique ait mis les principes de la Constitution Anglaise à la portée de tout le monde. Il est le premier qui ait porté le flambeau dans cet œuvre massive et qui ait montré que ces vieux remparts féodaux abritaient la liberté la plus large et la mieux réglée. Il avait fallu un coup de génie pour réunir tant d'éléments épars et en faire admirer la puissante unité. C'était presque une révélation. Aussi ne doit-on pas s'étonner qu'un jurisconsulte méthodique comme était BLACKSTONE se soit fait le disciple de MONTESQUIEU, et qu'il le cite comme une autorité”.

¹⁾ Even ALGERNON SIDNEY in his Discourse of Government (Sec. 37) admits : “Our law is so ambiguous, perplexed and intricate that tis hard to know when tis broken” and this was true both of the Civil law and the constitution.

And again in a foot note to the above. "La Constitution d'Angleterre du Gènevois DELOLME, ouvrage qui est à vrai dire le développement des deux Chapitres de MONTESQUIEU sur l'Angleterre, n'a paru qu'en 1771".

The two chief writers of the "Constitutionalists" were BLACKSTONE and DELOLME. Both were expounders of the principles of the English Government, as the name given to the school shows, both were universally read in America, and both misrepresented in certain respects the subject of which they treated. Every American lawyer must have read BLACKSTONE and many must have been led astray "by his habit common to all lawyers of his time -- of applying old and inapplicable terms to new institutions, and especially of ascribing in words to a modern and constitutional king, the whole and perhaps more than the whole of the powers actually possessed and exercised by WILLIAM the Conqueror" ¹⁾ According to BLACKSTONE, the two Houses of Parliament naturally drew in two different directions and the Crown in a third thus mutually keeping each other from exceeding their proper limit. ²⁾ DELOLME, who "puts into symetrical shape a set of propositions which long passed current with common place thinkers" ³⁾ goes even farther if possible, and regards the balance of the their legis

¹⁾ See Dicey. Law of the Constitution p. 7—10.

²⁾ Comp. Commentaries I. p. 155.

³⁾ LESLIE STEPHEN — English Thought in the 18th. Century II p. 209.

lative branches as perfect. We can thus easily understand that in America the real position of English royalty was not rightly grasped, all the more so, as GEORGE III's headstrong conduct towards the revolted colonies and his recent victory over Fox's Ministry would lend more color to such error. In so far as the sovereign of Great Britain may have been taken as a model, the members of the Convention copied an institution that was not what they supposed it to be; even if we may suspect that in his able parallel between the King of England, the President of the United States, and the Governor of New-York,¹⁾ HAMILTON, to help his argument, was not quite ingenuous about the attributes of the first of these characters.

The Constitutionalists developed the system of separation of powers into one of their balance and of all sorts of checks and complications. To preserve liberty not only must there be an Executive, a Legislative and a Judiciary independent of one another as far as could be, but Parliament must consist of three branches representing a democratic, an aristocratic, and a monarchical influence, each unable to accomplish anything of itself, but sufficient to restrain the other two. The whole object of JOHN ADAMS'S book is to defend and praise this complexity which led him to proclaim that "the English Constitution is, in theory both for the adjustment of the balance and the prevention of its vibrations, the most stupendous fabric

¹⁾ Federalist No. LXVIII.

of human invention.” “All the world” says Mr. GOLDWIN SMITH “went astray after constitutional kings and revising Senates, imagining that this was the road to British liberty”. “It was partly in consequence of these opinions, which were then fashionable, that the Government of our Constitution is complex and artificial. The intricacies of the British Constitution are the result of a slow historical developement. With us they were deliberately reproduced”. ¹⁾

No where is the force of these theories seen more clearly than in the powers given to the President. DELOLME had laid down the maxim that a single executive can be more easily restrained than a plural one, ²⁾ but it is nevertheless striking that, at a time when “the very semblance of monarchy” was intensely unpopular in America, the office of President should have been created, vested in a single man, made independent of the legislative, given ample powers and not even fettered by a council.

It is not so much to be wondered at that the bi-cameral system was adopted for the legislative branch, as it could far less easily arouse suspicion. It was a familiar institution that had worked well in practice and was an important feature in the reigning political philosophy of the day. GEORGE MASON said in the Convention that “the people of America, are unsettled in their minds, and their principles fixed to no object, except that a republican Government is the

¹⁾ BRANTLY p. 364.

²⁾ Constitution d'Angleterre Livre II Chap. 2.

best, and that the legislatures ought to consist of two houses".¹⁾ Here I must remark that in these last instances all must not be referred to purely theoretical principles. The familiar examples of the English and still more of the State Governments, had a great, perhaps the preponderating influence on the results reached. I merely wish to point out how they conform to the ideas of the time.

"We have never seen in our own generation — indeed the world has not seen more than once or twice in all the course of history, a literature which has exercised such prodigious influence over the minds of men, over every cast and shade of intellect, as that which emanated from ROUSSEAU between 1749 and 1762. It was the first attempt to re-erect the edifice of human belief "after the purely iconoclastic efforts commenced by BAYLE, and in part by our own LOCKE, and consummated by VOLTAIRE". I have inserted this forcible passage from Sir HENRY MAINE's well known book on Ancient Law²⁾ only as an introduction to a much longer and more interesting quotation, embodying a theory which we must needs examine. Speaking of the doctrine of the equality of mankind MAINE proceeds: — "Like all other deductions from the hypothesis of a Law Natural, and like the belief itself in a Law of Nature, it was languidly assented to and suffered to have little influence on opinion and practice until it passed out of the possession of the lawyers

¹⁾ ELLIOT I. 429. (Yates Minutes).

²⁾ Page 87.

into that of the literary men of the 18th. century and of the public which sat at their feet. With them it became the most distinct tenet of their creed, and was regarded as a summary of all the others. It is probable, however, that the power which it ultimately acquired over the events of 1789 was not entirely owing to its popularity in France, for in the middle of the century it passed over to America. The American lawyers of the time, and particularly those of Virginia, appear to have possessed a stock of knowledge which differed chiefly from that of their English contemporaries in including much which could only have been derived from the legal literature of Continental Europe. A very few glances at the writing of JEFFERSON will show how strongly his mind was affected by the semi-juridical, semi-popular opinions which were fashionable in France, and we cannot doubt that it was sympathy with the peculiar ideas of the French jurists which led him and the other colonial lawyers who guided the course of events in America to join the specially French assumption, that "All men are born equal" with the assumption more familiar to Englishmen that all men are born free, in the very first lines of their Declaration of Independence. The passage was one of great importance to the history of the doctrine before us. The American lawyers, in thus prominently and emphatically affirming the fundamental equality of human beings, gave an impulse to political movements in their own country, and in a less degree in Great Britain, which is far from having yet

spent itself; but besides this they returned the dogma they had adopted to its home in France, endowed with vastly greater energy and enjoying much greater claims on general reception and respect. ¹⁾ Impressed, as he expressly admits, by this passage, Mr. MORLEY wrote in the Fortnightly Review. ²⁾ "It is indeed a disputable question how much the ideas of the Colonial leaders were affected by the theories of the French philosophers. To the present writer it seemed that the Bible had more to do with the sentiment that led to the rising of the Colonies, than ROUSSEAU and the Social Compact. Nobody, however, who has examined so much as the mere surface of the question, would now dream of denying that the French theories of society played an important part in the preparation of American independence".

There is certainly much here to which we must take exception. I do not know what Maine's authority is for the statements that the doctrine of the equality of mankind passed over to America in the middle of the century or that American, and especially Virginia lawyers, ³⁾ had more than their English brethren a stock of knowledge drawn from Continental Europe, though one cannot help suspecting that it is only due to his

¹⁾ Ancient Law, page 94—96.

²⁾ Oct. 1879.

³⁾ The Virginia Bill of Rights of June 12h 1776, which is suggestive of the Declaration of Independence, "was the work of GEORGE MASON, a man deeply versed in English parliamentary history, but who was not indebted for any of his opinion to French literary men". BRANTLY p. 354.

examination of JEFFERSON'S writings and particularly the Declaration of Independence. To this there are several remarks to be made. In the first place JEFFERSON was by no means typical of the Americans of his day. The turn of his mind was often entirely different from that of the great majority of his fellow countrymen. Secondly, the assumption that "All men are born equal" was not particular to the French, although undoubtedly brought by them into great prominence, but is a simple deduction from the old theory of a state of nature, and, as we have seen, was explicitly stated by LOCKE. Thirdly, "The doctrine of the equality of men" played indeed, no important part, either at the time of the Declaration of Independence or in 1787. When the Constitution was adopted, there was in this country, no equality of political rights. In none of the states did universal suffrage prevail. The electoral franchise was not regarded as a birth-right, although all the conditions were present which were speedily to make it such".¹⁾ Equality as Sir HENRY MAINE himself has pointed out, has more than one interpretation.²⁾ There is no doubt that JEFFERSON'S celebrated sentence has greatly popularized and made a dogma of a general statement which can be understood in many ways.

That ROUSSEAU'S name was familiar in America

¹⁾ BRANTLY. p. 355.

²⁾ That "All men are equal" is one of a large number of legal propositions which in progress of time have become political. Ancient Laws p. 92.

Rousseau influence

at a time that it was so famous in Europe is a safe assertion. That many people had a general idea of his doctrine is more than probable; even if they had only read attacks on them like DELOLME'S on the subject of representation.¹⁾ That not a few had perused his works may also be admitted. These works had attained great celebrity, and had appeared a good many years before the American revolution.²⁾ Between that date and 1787 they were very possibly still more read. Some of the French officers were sure to have been disciples of "the eloquent philosopher of Geneva"³⁾ and to have spread his ideas, but what trace have we of their influence?

In none of the debates about the Constitution in the Philadelphia or the State Conventions or in the Federalist is ROUSSEAU'S name once mentioned or are any of his distinctive doctrines clearly put forth or unmistakably referred to. JOHN ADAMS, while occasionally mentioning him, does not include him in the list of authors that he takes the trouble to discuss particularly. WILSON was one of the best read members of the Convention. His library is praised by the Marquis de Chastellux in 1780 as containing "all our best authors on law and jurisprudence. The works of MONTESQUIEU and of the Chancellor d'Aguesseau hold the first rank among them and he makes them his daily study", and yet WILSON in the Pennsylvania

¹⁾ Book II Chap. 5.

²⁾ The Contract Social was published in 1762.

³⁾ ADAMS; beginning of Chap. I of his book on Government.

ratifying convention, speaking of the sovereignty of the people, said "I recollect no constitution founded on this principle; but we have witnessed the improve- and enjoy the happiness of seeing it carried into practice. The great and penetrating mind of LOCKE seems to be the only one that pointed towards even the theory of this great truth".¹⁾ Verily, if he had read the Contract Social it had made but little impression.

It has been too much taken for granted that whenever we find remarks about state of nature and social compacts, we are dealing with ideas of ROUSSEAU. Such they sometimes are, but how often are they original with him?²⁾ The greatness of his work lies far less in the newness of many of his theories than in the remarkable developement he gave to old notions and the pitiless logic with which he pushed his conclusions to their furthest consequences. The whole foundation of his Social Compact is strikingly like that of HOBBS,³⁾ and his conclusions, though at the

¹⁾ Elliot II p. 456.

²⁾ Es wäre Thorheit zu sagen, dass die ROUSSEAU'schen Schriften einen Einfluss auf die Entwicklung in Amerika ausgeübt haben. Aber derselbe Geist, welcher die ROUSSEAU'schen Philosophie geboren und die von so ungeheurer Bedeutung für Europa machte, war lange vordem JEFFERSON sich in Paris bis zur Thorheit in ihr berauschte — Auch in Amerika lebendig. HOLST Verf. in Dem. der Vereinigten Staaten von Amerika p. 26.

³⁾ It is only surprising that it was not sooner discovered that HOBBS' system could easily be twisted to support an unbounded popular sovereignty. JOHANN FRIEDRICH HORN, who even outdid HOBBS in preaching Absolutism, alone among older writers, recognized this and called HOBBS'S theories dangerous and revolutionary.

opposite pole of theory, are in many essential respects, analogous. Mr. MORLEY himself,¹⁾ has pointed out how much ROUSSEAU borrowed from LOCKE and it is strange that both he and Sir HENRY MAINE should have so completely overlooked the influence of the latter. Certainly the new democratic school gave a very much heightened prominence to many old doctrines and made them political where they were previously merely philosophical. JEFFERSON had very probably confirmed and cleared many of his ideas from the Contract Social long before he wrote the Declaration of Independence, but as we have seen, the original source of that document must be traced to LOCKE, not to ROUSSEAU. The same could be said of other publications and utterances which, at first sight, one might be tempted to ascribe to French ideas. In the quotations from RICHARD HENRY LEE and LUTHER MARTIN, given above, neither of the references to the social compact can fit in with the teachings of the Contract Social; the first not, because ROUSSEAU does not admit a contract between nation and government, a pactum subjectionis, the latter is but the servant of the former with no rights of its own; the second not, because this attempting to bind the whole people is in entire contradiction with the principles of its sovereignty. Of course we can hunt up or twist quotations to serve our purpose if we are determined to find such as resemble ROUSSEAU's teachings. When Gouverneur MORRIS announced "that the savage

¹⁾ In his book on ROUSSEAU.

state was more favorable to liberty than the civilized; and sufficiently so to life. It was preferred by all who had not acquired a taste for property which could only be secured by the restraints of regular Government. ¹⁾ We are reminded of the Discours sur l'inégalité parmi les Hommes. When HAMILTON declared "It is an unquestionable truth that the body of the people in every country, desire sincerely its prosperity; but it is equally unquestionable that they do not possess the discernment and stability necessary for systematic Government", ²⁾ we can see a likeness to sentences in the Contrat Social "La volonté générale est toujours droite et tend toujours à l'utilité publique Jamais on ne corrompt le peuple mais souvent on le trompe". ³⁾ There were hardly two men in the convention less democratic than G. MORRIS and HAMILTON. (The latter has been described as "by far the ablest of what may be called the English theory in the United States". ⁴⁾ It is important testimony if the former were really consciously putting forth a doctrine of ROUSSEAU that he continued with the remark that "these ideas might be new to some, but they were nevertheless just". Altogether we can conclude that whatever may have been the case after 1789, up till that time, the new school, though it must have been known in America, had not made great headway; that

¹⁾ ELLIOT V. 279.

²⁾ ELLIOT II p. 302.

³⁾ Contract Social Livre II Chap. 3.

⁴⁾ LESLIE STEPHEN II p. 260.

many ideas which might be attributed to it came from older sources, and that the statements of Sir HENRY MAINE and Mr. MORLEY are, to say the least, not proven.

This may seem surprising. The Americans were democratic and here was a most democratic system; their political ideas were often crude and from the time of the Revolution the tendency to a priori reasoning on Government notably increased, especially among the more discontented elements of the population. To people who believe in a state of nature and a social compact, ROUSSEAU's theories would be naturally attractive, expounded as they are in a matchless style, and with what often seems to be convincing logic. On the other side we must remember that the beauty of a style disappears in a translation, and that this logic was abstract and thereby not calculated to appeal to the cautious Anglo-Saxon taste. The *Contrat Social* made short work of the honored institutions and ideas so dear to the Anglo-Saxon mind; it preached a social as much as a political revolution, and the majority of Americans were satisfied with the condition of society; it declared the people to be every where in chains while in the years preceding the meeting of the Convention men of sense in America saw chiefly an abuse of liberty; ¹⁾ it condemned representative Government, ²⁾ and there was no country where the principle was more neces-

¹⁾ See MADISON'S letter to MAZZAI.

²⁾ Even Sieyes could not follow as far as this.

sary; it advised a State religion for purely state reasons, scoffed at christianity and could hardly appeal to a people devoutly christian and mostly protestant dissenters who looked on any interference of the State in the affairs of the church as an outrageous oppression.

Even in France the ideas of ROUSSEAU were many long years before attaining the vogue they had in 1789. In both divisions of the English race, social, political, historical and ethnological reasons made the ground in which they were sowed unfertile for them. What Mr. LESLIE STEPHEN says of England in this connection ¹⁾ applies also to America though with lesser force. "As it was that GOSPEL never became fairly acclimatized, and never won a proselyte capable, even in a faint degree, of rivalling the influence of the original teacher. Englishmen stuck doggedly to their old ways; they despised the new ideas as much because they were supposed to be French as because they could be shown to be demoralizing. With that obstinate unreason which sometimes verges on the sublime, they worked on in their slow blundering fashion. When discontented they preferred the traditional twaddle about the various Palladia of British liberty to any new fangled outcries about the rights of man".

Two of the most prominent and most distinguished Americans of the day are generally quoted as representing the French school of thought. This is

¹⁾ II p. 195.

Jefferson
undoubtedly true of JEFFERSON though it is still a disputed point how much of his opinions was due to his stay in Paris. As he had nothing to do with the formation of the constitution I shall not dwell upon him. It is more doubtful, whether FRANKLIN was really seriously affected by the writings of ROUSSEAU. What is certain, however, is that he was an intimate friend of both the English radical authors PRIESTLY and PRICE¹⁾ who represented the new ideas in Great Britain, and that his opinions were not in the least those of the orthodox school. In the convention he favored a plural executive²⁾ and a single house³⁾ beside making various other propositions most of them impractical and little heeded. His chief influence was as a moderator.⁴⁾

Franklin plural executive

There yet remain to be considered a few minor points in the American doctrines of 1787. We continually hear the praise of agriculture and notice a tendency to place particular value upon land, while commerce is not infrequently depreciated. We even find in one of WASHINGTON's letters "It has long been a speculative question among philosophers and wise men whether foreign commerce is of any real advantage to any country";⁵⁾ At least in the first of these

¹⁾ PRIESTLY'S Treatise on civil Government appeared 1768 PRICE'S Observations on Civil History appeared 1775.

²⁾ or failing this, a council. ELLIOT V. 154 and 525.

³⁾ He was emphatic all his life on this point. Even after the Convention closed. See his letters. PRIESTLY however favored two Houses.

⁴⁾ Compare Curtis 290—294.

⁵⁾ Writings IX, 140. For a good instance of this prejudice see CHARLES PINCKNEY'S speech on S. Carolina. ELLIOT IV, 321.

ideas, though they were due mainly to the fact that the great majority of the Americans were connected with agriculture, we can trace a remnant of the doctrines of the Physocratic school¹⁾ which had only recently been driven out of the field by ADAM SMITH.²⁾

It is curious that the Philadelphia Convention adopted one or two very important principles with little or no discussion of their nature. In the different French constitutions, both integral and partial renewal have been often tried with no very great success. In the American one both systems were applied in a way that has given satisfaction ever since. Again, the French have made numerous experiments with both Scrutin de Liste and Scrutin d'Arrondissement, and the subject has been discussed repeatedly. In the United States the matter was arranged without trouble, and both these questions may be regarded as settled while it is very doubtful if they are as yet in France. The mode of electing the President by Electors was very possibly taken from MARYLAND,³⁾ but this idea of an election in two degrees, a new principle, totally unknown to English example and theories, was accepted by a weary convention with surprisingly little discussion as to its own merits, and met with no criticism from the public.⁴⁾

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¹⁾ HARRINGTON also dwells on the importance of land.

²⁾ The Wealth of Nations appeared in 1776.

³⁾ BOWDOIN in the Mass. Convention (ELLIOT II 128). It is worth noting that he was the only person to state this and he used the word "probably".

⁴⁾ Federalist LXVII.

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Protestants*

There is one more influence to point out before taking leave of this part of the subject, and that is the fact that most of the Americans were Protestants of the Calvinistic type. This bears on the case from the doctrine of original sin, the natural perversity of mankind. Judging from a great number of remarks at the Philadelphia Convention, where the members were not afraid to speak their real minds, many of them had by no means a very exalted opinion of most of their fellow citizens. Such a feeling would have great weight in keeping them on practical ground, and discouraging ideal institutions that depend on too much virtue in mankind. This point has been well put by Mr. HORACE WHITE.¹⁾ The Constitution of the United States is made of checks and balances. Harmony of the different branches was not contemplated by its framers. It does not presume upon good understanding. While providing that the majority shall prevail in the long run, it provides also for the freest play of the passions and interests within defined limits. It is based upon the philosophy of HOBBS and the religion of Calvin. It assumes that the natural State of mankind is a State of war, and — that the carnal mind is at enmity with God”.

checks & balances

Turning now to institutions that existed or had existed in other countries and furnished suggestions to the Fathers of the Constitution, the first question that confronts us is what was the extent of their

¹⁾ Fortnightly Review Oct. 1879 p 516.

Introduction

knowledge of history and foreign politics. On the whole the answer is decidedly favorable. Though to the reader it seems at first as if the same old examples are repeated again and again until they are more than threadbare, the range is as wide as could have been expected; ¹⁾ the facts are accurate ²⁾ and the application good. This even holds true for the ratifying convention, as both parties had had time to get ready their artillery in advance. The last work on Government was JOHN ADAMS's book which came out after the delegates had already assembled at Philadelphia, and which contained a classified description of all republics from San Marino to the Phœnicians. The Federalist often uses its examples with great force, though at times a little captiously, laying much stress on foreign precedent, or talking of the "dim light of history as the occasion demands". Undoubtedly many gentlemen refreshed their studies at this period, and many were in any case educated and well informed men. MADISON, long before he was sent to Philadelphia, prepared himself on political questions taking advantage of JEFFERSON's stay in Paris to obtain through him many works which might not otherwise have been easily procurable. He was thus enabled to draw up a very good sketch (of which the one in WASHINGTON's possession was probably a copy) of the chief confederacies ancient and modern, which served him as an arsenal for many an argument at

¹⁾ There are few references to the Italian republics.

²⁾ PATRICK HENRY was sometimes an exception to this rule.

Philadelphia and Richmond; and which he afterwards summarized in the eighteenth number of the Federalist. Even Washington fortified himself by reading MONTESQUIEU. ¹⁾

The result of these studies was chiefly negative it was seen that none of the confederacies known had proved a permanent success, and that there was none whose general features the Americans should copy. On the contrary here were good models of what to avoid, and particularly the feature that had characterized them all, the action of the central authority on States instead of individuals. In many ways the confederation the Americans then lived under, though every day a greater practical failure, in theory, seemed almost the best yet known. ²⁾ The literature of any importance about this form of Government, old as it was, was most scant, consisting chiefly in a few passages of MONTESQUIEU. PUFFENDORF, among others, had denied to confederacies a place as a legitimate species; he recognized only unified States and mere leagues; and termed the Holy Roman Empire a "monstrum".

There was little that antiquity could offer as an example to guide Americans except its leagues. It is conceivable, even if not very likely, that we have a clause in the constitution guaranteeing to every state a republican form of Government because Phillip overthrew the liberties of Greece after getting into the

¹⁾ BANCROFT'S Hist. of the Constitution I. 278.

²⁾ For a comparison see KENT'S Commentaries page 214 and HART'S introduction to the study of Federal Government.

Amphictyonic Council, ¹⁾ and MONTESQUIEU called attention to this ²⁾ and warned against having monarchies in the same confederacy with Republics. Another possibility is that the plan of having a National Capitol under the exclusive jurisdiction of the United States, which we already find in a resolution ³⁾ passed in 1783, was first suggested by the example of Delphi which derived all its importance from the fact that it contained the famous temple and oracle, was the place of celebration of the Pythian games, the seat of the Amphictyonic Council, in short the Capitol of the Greek race. The possible influence of the example of the Lycian League as praised by MONTESQUIEU has already been adverted to.

The general feeling about the Holy Roman Empire was expressed by WILSON during one of the debates on the formation of the Confederation. "The Germanic body is a burlesque on Government and their practice on any point is a sufficient authority and proof that it is wrong". ⁴⁾ I fail to see any sufficient ground for Sir HENRY MAINE's belief that "it seems probable that the framers of the constitution of the United States . . . were guided to a considerable extent" by the example of the Empire or why. "The American Republican Electors are the German Imperial Electors except that they are chosen by the

¹⁾ See references in the ratifying debates and in the Federalist

²⁾ Livre IX. Chap. 2.

³⁾ Journals of Congress on Curtis p. 154.

⁴⁾ ELLIOT I. 78.

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several States".¹⁾ Still the Holy Roman Empire was in MADISON's and WASHINGTON's abstracts of confederacies and was analysed in the Federalist. Though it is perhaps not very likely that the Reichskammer-Gericht suggested the idea of the Supreme Court of the United States, as it is described in the abstract, it probably was present in the minds of those who had read the paper; and we can say that in spite of all the differences in the character of the two tribunals, the Reichskammergericht was the nearest approach to a model that our federal courts had.²⁾

The example of POLAND was before all eyes and made the members of the convention particularly anxious to find some means of electing the President that would leave no room for foreign immixtion or intrigue. The partisans of election by the people and those of election by Congress each declared that the way recommended by the other side was like the Polish practice and liable to the same dangers.³⁾ The system of Electors quieted both, but the same apprehensions were undoubtably the chief reason for the clause providing that the President must be born in America.

The union of the Swiss Cantons was so loose that it was little referred to, although a historical

¹⁾ Popular Government p. 226. The rest of the page trying to prove how the two institutions failed in the same way is even farther fetched.

²⁾ On the Reichskammer-Gericht see BERY. Grundriss der Reichsgerichtlichen Verfassung (Göttinge 1797).

³⁾ See ELLIOT. V. p. 322. 323. 364.

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Elliot V. p. 322 323

debate on the subject look place in the Virginia Convention. ¹⁾

The Republic of the United Neitherlands offered a much more fruitful subject for study. ²⁾ It had began with a Declaration of Independence, thereby setting an example to America; ³⁾ and its constitution resembled in many ways and served as a model to the articles of Confederation. ⁴⁾

The failure of the copy discredited the model which was fast going to ruin on its own account. The Americans seem to have followed the troubles in the United Provinces with considerable interest; and though it was not until after the meeting in Philadelphia that the King of Prussia marched his troops into the unfortunate little country, its weakness was plain to every one some time before. Undeterred by this, the Anti Federalists continued to admire the Dutch Republic by turning their eyes from its wretched present to its past glories. To the Federalists the History of the Netherlands furnished very effective arguments against a government that could coerce States only, and where unanimity was required; and perhaps it helped to con-

¹⁾ ELLIOT III 143. 189, 211. 205 etc.

²⁾ See "La Forme du Gouvernement dans la Republique des Provinces Unies" by the late Mr. E. de Lovelaye. (Revue des Deux Mondes May 15. 1874.)

³⁾ KENT'S Commentaries Book X p. 208.

⁴⁾ The confederation "formed in the Dutch Model where circumstances are entirely different" — GRAYSON printed in BANCROFT'S History of the Constitution I 492.

See also I p. 11 of the same work. That this fact was recognized in Europe is proved by TURGOT mentioning it in his letter to Dr. PRICE.

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vince wavering minds of the necessity of a powerful executive vested in one person. ¹⁾

It is a difficult task to attempt a separation of English influence in the formation of the Constitution into mediate and immediate. Where one member of the Convention would be thinking of some institution in England, another would have in mind something in his own state, a distinction not without much importance as showing the ideas of the founders of the constitution; for the condition of mind of a man copying a state senate is different from that of one who wishes to get as near as possible to the House of Lords. The distinction becomes all the more important if we agree to the theory of Mr. W. C. MOREY. ²⁾ "The first point which I have tried to illustrate in this rapid sketch of the Genesis of the American Colonial Constitutions is the fact that the original frame of Government which they established was, in no proper sense, patterned after the structural features of the English Government; but that it was merely a reproduction or continuation of the Government established by charter for the colonial trading companies as seen in the East India Company and in the London Company under its third charter' and in the Massachusetts Bay Company". I shall not attempt to enter into this question or to make an ex-

¹⁾ The Stadhouder thanks to his anomalous position could be and was used as an argument both for and against a string executive. ELLIOT IV. 146. 190, 225 etc.

²⁾ The Genesis of a written constitution in the Annals of the Am. Academy of Political and Social Science. April 1891. p. 55

haustive study of what our constitution owed to the Mother country and what to the States, but shall merely point out a few provisions where the direct English influence seems to me unmistakable.

If a very little reading of the debates of the Federal Convention shows that one more statement of Sir HENRY MAINE is incorrect viz: — that the framers of the Constitution “took the King of Great Britain, went through his powers and restrained them whenever they appeared to be excessive or unsuited to the circumstances of the United States,”¹⁾ a very little reflection is necessary to convince one that it is an error to look at the President as a sort of enlarged governor of New-York, though this view might be useful to oppose to those who saw in his office “the foetus of monarchy”.²⁾ It is best to distinguish between his position towards his fellow countrymen and towards foreign nations, or as LOCKE would have put it, between his Executive and his Federative power. In the one his situation much resembles that of the Governor of a state; in the other, he is the representative, aided and controlled by the Senate, of the sovereignty of the American people. As this representation he has the sole right of making treaties even though they must be confirmed, any innovation that was compromise between English and Roman practice.

The President must take an oath before entering into his office. Here, whatever may be the rules that

¹⁾ Popular Government p. 212.

²⁾ E. RANDOLPH, ELLIOT V. p. 141.

apply to different Governors, it is plain that what the convention feared, was attempts at usurpation on the part of the President: and that this fear was due to historical reasons and particularly to English history.¹⁾ Even the most rabid partisans of liberty could not be afraid that a governor would try to make himself a king.

In the same way in the case of impeachment, even if the method actually adopted is nearer that of Massachusetts or New-York, the idea at the bottom of the provision was impeachment by the Commons before the Lords.

The power of pardoning all offences except impeachment, was a prerogative of the English Kings, limited here by a jealousy of the President aiming at royal power and protecting his tools.

Treason — The members of the Convention "resorted to the great English statute of the 25th EDWARD III. and from it they selected two of the offences there defined as treason, which were alone applicable to the United States."²⁾

When the Convention met at Philadelphia, few, if any, of the members, though they mostly were in favor of two houses, had any idea of having one represent the people and the other the States, The prevailing wish was to have the upper house represent property and the aristocratical principle in society. There was no hesitation about expressing an admiration

¹⁾ Compare von HOLST. Verfassungsgeschichte der Vereinigten Staaten. I. p. 81.

²⁾ CURTIS'S Constitutional History I. p. 561.

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for the House of Lords, and even a desire of imitating it as far as might be. DICKINSON wished the Senate to consist of the most distinguished characters, distinguished for their rank in life and their weight of property and bearing as strong a likeness to the British House of Lords as possible. ¹⁾ Gouverneur MORRIS thought "the second branch ought to be composed of men of great and established property-aristocracy". ²⁾ It was in contradistinction to this idea and not to that of the representation of the States that the vote for the lower branch was given directly to popular choice. When, after a bitter fight, the small States succeeded in obtaining an equal representation in the Senate though its nature changed at once and it became the embodiment of states rights, Still a certain-flavor of its former destination, of what we can call the English idea still cling to it in the eyes of both-friends and enemies; it was one reason why it was endowed with so much power, such a long term of office and generally conservative stamp. / This is also the chief ground on which it was attacked outside. There was another argument based on English history for strengthening the Senate. In spite of the false expressions used by the Constitutionalists, the Americans knew that in Great Britain the House of Commons had become much more powerful than both the Crown and the Lords. Arguing from this principle, which they assumed to be universal, of the

¹⁾ ELLIOT V. p. 163. 166.

²⁾ ELLIOT I p. 475; V. 271.

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tendency of the popular branch to gain on the other house ¹⁾ and the executive they were the more inclined to fit out the two latter with sufficient powers of self defense to preserve the sacred balance deemed necessary to liberty and good government.

House
of Rep.

When, as a part of the great compromise between the large and the small States, the exclusive right of initiating money-bills was granted to the House of Representatives, this privilege, whatever it might be worth, was obviously of direct English origin and its importance was weighed by the value of the more extensive one of the House of Commons in Great Britain, and not by its worth in such few States where it happened to exist, without any particular *raison d'être* or giving particular satisfaction. ²⁾

The last half of Section 6 preventing any Congressman from getting into any office created or more richly remunerated while he was a legislator, or from being a Congressman and an official at the same time was intended to prevent such corruption as had existed in Parliament throughout the century and of which Walpole had been the most famous master. ³⁾

The old cry against standing armies which Boling broke and others had kept up long after it ought to have died out peaceably in England, was raised in America with perhaps increased intensity and with

¹⁾ Federalist p. 444.

²⁾ The delegates from S. CAROLINA declared it had worked badly there.

³⁾ See CURTIS'S Constitutional History I 470—474.

still less reason. In deference to this and in obvious imitation of the English practice of an annual mutiny bill, the provision in the Constitution was inserted that no maintenance of soldiers should be voted for more than two years at a time. If at the present day such a precaution seems to us superfluous we must make allowances for the prejudices of the age.

It is very necessary not to lose sight of this in judging the whole work of the convention. Amid many true ideas we find not a few that now seem to us false, expectations that have not been fulfilled and fears that were groundless. And yet, this does not detract from the merit of the remarkable men that met together in Philadelphia in 1789. They builded better than they knew, but they builded the best they knew; and they have left a debt of gratitude behind which no American should ever forget.

Archibald Cary Coolidge.

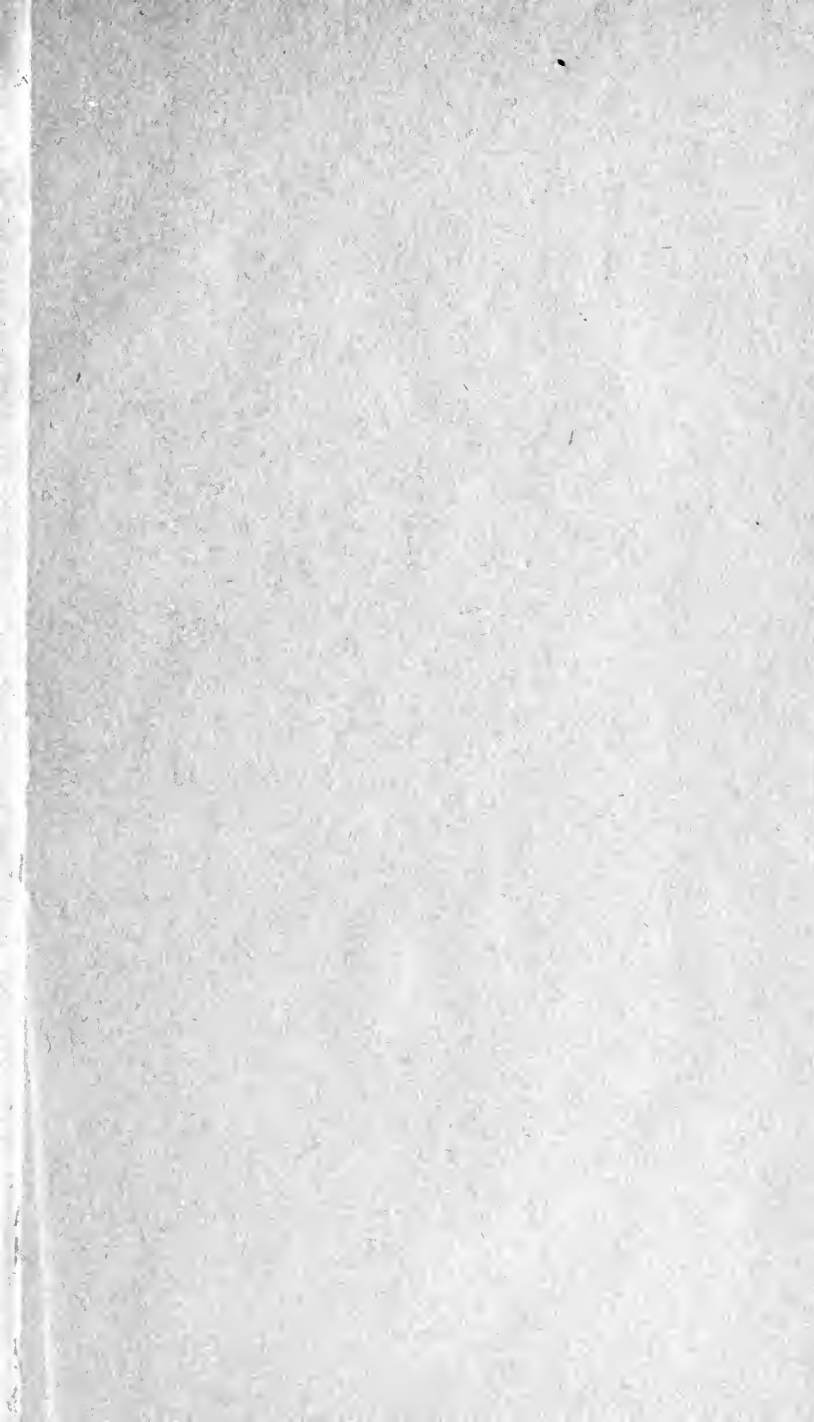


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